DATO WONG GEK MENG

v.

PATHMANATHAN MYLVAGANAM & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-79-1997]
5 SEPTEMBER 1997

CIVIL PROCEDURE: *Appeal - Appeal from registrar to judge-in-chambers - Rules of the High Court 1980, O. 56 r. 1(1) & (2) - Form 114 - Notice of appeal not in compliance - Effect of non-compliance - Whether compliance with form and rules mandatory*

CIVIL PROCEDURE: *Rules of procedure - Observance of - Administration of justice - Principles applicable now - Obsolescence of old views*

LEGAL PROFESSION: *Liability as officer of court - Duty to court - Importance of - Misconduct - Deception - Fraud - Bringing of vexatious and frivolous proceedings*

LEGAL PROFESSION: *Liability as fiduciary - Obligations - Equity and common law - Negligence*

The plaintiff, who was represented by M/s PM Mahalingam & Co, filed a writ of summons and a statement of claim against all the four defendants and sought, *inter alia*, damages in the sum of RM5,000,000. The defendants in due course filed their statement of defence.

The subject matter of the present appeal concerned three enclosures, namely encls. 21, 46 and 49 which were appeals by the plaintiff to the judge-in-chambers against the decision of the Senior Assistant Registrar ('the SAR') under O. 56 r. 1(1) of the Rules of the High Court 1980 ('the RHC').

Enclosure 21 was related to encl. 5 which was an application by the defendants to extend the time to file and serve the statement of defence until the defendant's application to strike out the writ of summons and the statement of claim had been decided by the court. The SAR allowed the said application in encl. 5, and being dissatisfied the plaintiff filed a notice of appeal to the judge-in-chambers in encl. 21.

Enclosure 46 was related to encl. 30 which was an application by the plaintiff for leave to cross-examine the defendants' affidavits. The SAR refused the said application in encl. 30 and this prompted the plaintiff to file a notice of appeal to the judge-in-chambers in encl. 46.

Enclosure 49 was related to encl. 12 which was an application by the defendants to strike out the writ of summons and the statement of claim. The SAR allowed the said application in encl. 12 and the plaintiff filed a notice of appeal to the judge-in-chambers in encl. 49.

Held:

[1] In filing an appeal to judge-in-chambers, the format in Form 114 of the RHC must be complied with. The format for appeal as adopted in encls. 21, 46 and 49 was contrary to Form 114 of the RHC. In filing the said enclosures, Mr PM Mahalingam had developed a format of his own. It was a complete change which was unknown to the law. The non-compliance was so fundamental that it went to the very root of the legal process.

[2] Strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice will be curtailed if the rules embodied in the RHC are not religiously followed. As a code of procedure the RHC should be strictly followed to the letter.

[3] The obligations of a solicitor towards his client must be viewed at two angles. Firstly, at equity, and secondly, at common law. In equity, the relationship between a solicitor and his client is entirely fiduciary and it carries with it the obligations on the solicitor's part to act not only with strict fairness but also with an attitude of openness. Failure to adhere to this onerous obligation renders the solicitor liable to compensation for any loss incurred by his client. On the other hand, at common law, a solicitor by his retainer must be skilful and careful. He must put at his client's disposal not only his skill but also his knowledge of the law as far as it is relevant and germane. Mr PM Mahalingam's lackadaisical attitude in filing encls. 21, 46 and 49 without complying with Form 114 opened him, in law, to liability in tort for negligence.

[4] Great care has to be exercised when a solicitor is dealing with the court. As an officer of the court, the solicitor must not do anything so as to deceive the court. The time has come for the courts to adopt a stringent approach and castigate lawyers who by deception deceive the courts into believing that concessions made by the lawyers to strike out their appeals

will end the adjudication, once and for all. Stringency is desirable to prevent breaches of the Legal Profession (Practice and Etiquette) Rules 1978.

[5] Misconduct in proceedings may extend to bringing vexatious and frivolous proceedings, filing an action knowing that there is no reasonable cause of action or for that matter defending an action on the basis of flimsy defences having little or no chance of success, or filing proceedings which are fraudulent or filing what may be termed as instituting unnecessary proceedings. But misconduct that will stir the court to life and that will receive the vehement disapproval of judges is deception. To practise deception in the court is akin to "ridiculing" the court. That is misconduct so grave that words cannot describe it.

[6] The solicitor should fearlessly conduct the cause of action having both his duty to the court as well as his duty to his client in mind, but the solicitor must always be mindful of the importance of his duty to the court.

[Enclosures 21, 46 and 49 struck out with costs.]

Cases referred to:
Bernstein v. Jackson [1982] 1 WLR 1082 ***(refd)***
Bird v. Harris [1881] WN 5 CA ***(cit)***
Cheah Cheng Hoc v. Public Prosecutor [1986] 1 MLJ 299 ***(refd)***
Clark v. Girdwood [1877] 7 Ch D 9 ***(cit)***
Cockle v. Whiting [1829] 1 Russ & M 43 ***(cit)***
Dundas v. Dutens [1790] 1 Ves 196 ***(cit)***
Evans v. Bartlam [1937] AC 473 ***(refd)***
Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd [1991] 2 MLJ 129 ***(refd)***
Leal v. Dunlop Bio-Processes [1984] 1 WLR 874 ***(refd)***
Midland Bank Trust Co Ltd v. Hett, Stubbs and Kemp (a firm) [1979] Ch 384 ***(cit)***
Myers v. Elman [1940] AC 282 ***(cit)***
Nocton v. Lord Ashburton [1914] AC 932 HL ***(cit)***
Ong & Co Pte Ltd v. Carl YL Chow [1987] 2 MLJ 430 ***(refd)***
Owen v. Ord [1828] 3 C & P 349 ***(cit)***
Penn v. Bristol & West Building Society (1995 Times, 19 June) ***(cit)***
R v. Fielding [1758] 2 Burr 654 ***(cit)***
Re Burford, Burford v. Clifford [1932] 2 Ch 122 CA ***(cit)***
Re Cooke (A Solicitor) [1889] 33 Sol Jo 397 CA ***(cit)***
Re Hill [1868] LR 3 QB 543 ***(cit)***
Re Parker [1819] Buck 313 ***(cit)***
Rolfe v. Rogers [1811] 4 Taunt 191 ***(cit)***
Ross v. Caunters [1980] Ch 297 ***(cit)***
Saif Ali v. Sydney Mitchell & Co [1978] 3 All ER 1033 ***(refd)***

Spector v. Ageda [1973] Ch 30 ***(cit)***
Stephens v. Hill [1842] 10 M & W 28 ***(cit)***
Taylor v. Lawrance [1892] 27 LJ 422 ***(cit)***
White v. Jones [1995] 2 AC 207 ***(cit)***
Wiggins v. Peppin [1839] 2 Beav 403 ***(cit)***
Yee Chang & Co Ltd v. NV Koninklijke Paketvaart Maatschappij [1958] MLJ 131 ***(refd)***
Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors [1997] 2 CLJ 467
Yukilon Manufacturing Sdn Bhd (No 2) & Anor v. Dato' Wong Gek Meng & Ors [1997] 4 CLJ 209
Yukilon Manufacturing Sdn Bhd (No 3) & Anor v. Dato' Wong Gek Meng & Ors [1997] 3 CLJ Supp 279

Legislation referred to:
Legal Profession Act 1976, ss. 77, 94(3)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 15, 17, 18
Rules of the High Court 1980, O. 2 r. 1, O. 18 r. 19(1), O. 56 rr. 1(1), (2)

For the plaintiff - PM Mahalingam; M/s PM Mahalingam & Co
For the defendants - Yusof Khan Ghows Khan; M/s Gan & Lim

JUDGMENT

Abdul Malik Ishak J:

This case is an offshoot of three cases which have since been reported. The three cases were:

(1) *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors* [1997] 2 MLJ 212; [1997] 2 CLJ 467;

(2) *Yukilon Manufacturing Sdn Bhd '(No: 2)' & Anor v. Dato' Wong Gek Meng & 3 Ors* [1997] 3 AMR 2641; [1997] 4 CLJ 209; and

(3) *Yukilon Manufacturing Sdn Bhd '(No: 3)' & Anor v. Dato' Wong Gek Meng & 3 Ors* [1997] 4 AMR 324; [1997] 3 CLJ Supp. 279.

In this case, the plaintiff who was represented by Messrs P.M. Mahalingam & Co. filed a writ of summons and a statement of claim against all the four defendants and sought, *inter alia,* for damages in the sum of RM5,000,000 (five million ringgit) and other inter-related reliefs. The defendants in due course filed their statement of defence as reflected in encl. 38. On 29 August 1997, encls. 21, 46 and 49 came up for hearings and these enclosures were in fact appeals by the plaintiff to the judge-in-chambers against the decisions of the Senior Assistant Registrar ('SAR') under O. 56 r. 1(1) of the Rules of the High Court 1980 ('RHC').

Surprisingly, Mr. P.M. Mahalingam, who acted for the plaintiff, in the course of a rather brief argument decided to withdraw encls. 21, 46 and 49. It was an unprecedented move. Yet, Mr. P.M. Mahalingam has the audacity to lodge an appeal against the striking out of encls. 21 and 46 with costs, and the striking out of encl. 49 without costs.

Now, encl. 21 is related to encl. 5 which was an *ex parte* application in chambers by the defendants to extend time to file and serve the statement of defence until the defendants' application to strike out the writ of summons and the statement of claim had been decided by the court. Enclosure 5 was supported by an affidavit of Mr. Gan Techiong that was affirmed on 2 May 1997. The SAR entertained encl. 5, and being dissatisfied the plaintiff filed a notice of appeal to the judge-in-chambers in encl. 21.

Enclosure 46 is related to the summons-in-chambers filed by the plaintiff in enclosure 30 for leave to cross-examine defendants numbers 1, 2, 3 and 4's affidavits that were affirmed on 2 May 1997, 5 May 1997, and 24 April 1997. It seems that encl. 30 was supported by the affidavit of Dato Wong Gek Meng JP that was affirmed on 19 May 1997. The SAR refused to accede to encl. 30 and this prompted the plaintiff to file a notice of appeal to the judge-in-chambers as reflected in encl. 46.

Finally, encl. 49 is related to encl. 12 which was the defendants' application by way of a summons-in-chambers to strike out the writ of summons and the statement of claim under O. 18 r. 19(1)(a) or (b) or (c) of the RHC. Enclosure 12 was supported by:

(a) the joint affidavit of Mitsuhiko Sakamoto and Makoto Togase that was affirmed on 24 April 1997;

(b) the affidavit of M. Pathmanathan that was affirmed on 2 May 1997; and

(c) the affidavit of Gan Techiong that was affirmed on 5 May 1997.

The SAR acceded to encl. 12 and the plaintiff filed a notice of appeal to the judge-in-chambers as seen in encl. 49.

It must be emphasised that encls. 21, 46 and 49 have not been served on the defendants but Mr. Yusof Khan, the learned counsel for the defendants, was prepared to waive service of these enclosures. I shall now proceed to the heart of the matter.

Enclosure 46

Before proceeding to submit on this enclosure, Mr. P.M. Mahalingam for the plaintiff orally applied to delete paras. 1, 4(a) and 4(b). I allowed those deletions as prayed for orally. Mr. Yusof Khan for the defendants then proceeded to submit. He submitted on these lines:

(1) That paras. 5, 6 and 7 of encl. 46 have been deleted by Messrs P.M. Mahalingam & Co., the law firm that acted for the plaintiff. Indeed this was a correct assertion. The deletions were made in black ink that was cut across paras. 5, 6, and 7 of encl. 46. An ugly sight.

(2) That para. 3 of encl. 46 cannot be made a subject of appeal as it was related to a submission made before the SAR. Moreover, the format adopted in encl. 46 was contrary to Form 114 of the RHC. It is true that encl. 46 did not comply with the standard format as shown in Form 114. In filing encl. 46, Mr. P.M. Mahalingam developed a format of his own. It was a complete change which was unknown to the law.

It was argued by Mr. Yusof Khan, and rightly so, that encl. 46 was not before this court and it should be dismissed in limine. Mr. Yusof Khan further argued that the defendants were embarrassed even though encl. 46 was not served on them and prayed that encl. 46 be dismissed with costs. Of great significance would be the arguments that the rules of the RHC should *prima facie* be obeyed and not flouted with impunity.

This is a classical case where the breach for non-compliance of the RHC was so fundamental that it went to the very root of the legal process. In *Kuah Kok Kim v. Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129, the Singapore's Court of Appeal applied a stringent approach when it said:

Notwithstanding the very wide powers given to the court to remedy non-compliance with the rules ... there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under r. 1 to remedy it.

In *Bernstein v. Jackson* [1982] 1 WLR 1082, the English Court of Appeal held the view that the failure to renew a writ within the time specified in the rules was "such a fundamental defect in the proceedings" that it was not a fit and proper case for the exercise of the court's discretion under O. 2 r. 1. Stephenson LJ in *Leal v. Dunlop Bio-Processes* [1984] 1 WLR 874 expressed his indignant when he said that the seriousness of the irregularity was the basis for not exercising the discretion to cure notwithstanding the fact that real prejudice may not be caused at all. In Stephenson LJ's words: "... the court's restraining hand is an important restriction on the misuse of ... procedure." More direct to the point would be the observations of Chan Sek Keong J in

Ong & Co Pte Ltd v. Carl YL Chow [1987] 2 MLJ 430, where his Lordship said that the failure to comply with the provisions of the rules showed that "the plaintiff has in fact disregarded the legal basis upon which judicial power in Singapore may be exercised in Malaysia ... . That must render the purported service a nullity." In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multi Super Corridor, lawyers cannot afford to adopt a lackdaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure the RHC should be strictly followed to the letter.

Mr. P.M. Mahalingam for the plaintiff agreed totally with the sentiments expressed by Mr. Yusof Khan. Mr. P.M. Mahalingam unabashedly admitted that he had changed the format in Form 114 and he also admitted that he had made a mistake. Surprisingly, as s senior member of the Bar, Mr. P.M. Mahalingam claimed to be solely negligent and sought to withdraw encl. 46.

On these submissions, I struck out encl. 46 with costs.

Enclosure 49

Mr. Yusof Khan for the defendants raised the same objections as he did in relation to encl. 46. He submitted that encl. 49 should be struck off with costs as it contravened Form 114 of the RHC.

A perusal of encl. 49 revealed several paragraphs that have been deleted by a stroke of a pen. Paragraphs 1, 2, 3, 4(a) and 4(b) of encl. 49 have been deleted manually with black ink that was put across those paragraphs in childish fashion. So too were paras 7(a) and 7(b) of encl. 49. What was left were paras. 5 and 6 of encl. 49. Mr. Yusof Khan rightly submitted that encl. 49 should be withdrawn and failing which this court should strike it out.

Mr. P.M. Mahalingam for the plaintiff agreed that encl. 49 was not in substantial compliance with Form 114 of the RHC. He too agreed that the existing paras. 5 and 6 of encl. 49 were unclear and he proposed to withdraw encl. 49 forthwith.

Without hesitation, I struck out encl. 49 with costs.

Enclosure 21

Mr. Yusof Khan rightly submitted that in view of the dismissal of encl. 49 which meant that the writ of summons and the statement of claim have been struck off, encl. 21 had become academic. Mr. Yusof Khan further submitted that Mr. P.M. Mahalingam had intimated to him that he desired to withdraw encl. 21. That being the case, Mr. Yusof Khan was magnanimous enough not to ask for costs.

Mr. P.M. Mahalingam agreed that encl. 21 was defective and it should be set aside forthwith. With this concession, I struck off encl. 21 without costs.

Solicitor's Obligations Towards His Client

It is apparent that encls. 6, 49 and 21 did not comply with O. 56 r. 1(2) of the RHC. Form 114 as set out in the RHC was not complied by the plaintiff thereby attracting adverse comments by Mr. Yusof Khan. Order 56 r. 1(2) of the RHC states that:

> The appeal shall be brought by serving on every other party to proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the judge on a day specified in the notice.

For clarity, Form 114 of the RHC is reproduced hereinunder:

No. 114

NOTICE OF APPEAL TO JUDGE IN CHAMBERS
(O. 56 r. 1)

(Title as in action)

Take notice, that the abovenamed plaintiff (or defendant) intends to appeal against the decision of the Registrar given on the ... day of ..., 19 ... ordering (or refusing to order)(state in full the order appealed against).

Dated the ... day of ..., 19 ...

...

Solicitor for the ...

And further take notice, that you are required to attend before the judge in Chambers on ... the ... day of ..., 19 ... at ...m, on hearing of an application by the said plaintiff (or defendant), that (state the order sought to be obtained).

Dated the ... day of ..., 19 ...

(Seal)

...

Registrar

To ...

Now, in changing the format as set out in Form 114 of the RHC, Mr. P.M. Mahalingam admitted that the mistake was entirely his and that he was solely negligent. It was a perilous course for him to take but he took it within his stride. The House of Lords in *Saif Ali v. Sydney Mitchell & Co. (a firm)* [1978] 3 All ER 1033; [1980] AC 198 had occasion to consider the question of immunity from being sued enjoyed by a barrister or solicitor when engaged in the conduct of litigation. I need only to refer to the majority decision taken from the headnote ([1980] AC 198 at p. 199]), so far as is relevant to the present case, to illustrate the point:

> ... that in principle those who undertook to give skilled advice were under a duty to take reasonable care and skill, and that a barrister's immunity from suit for negligence in respect of his conduct of litigation on the ground of public policy was an exception and applied only in the area to which it extended; that the immunity was not confined to what was done in court but included some pre-trial work, but that protection should not be given any wider application than was absolutely necessary in the interests of the administration of justice and each piece of pre-trial work had to be tested against the one rule, namely, that the protection existed only where the particular work was so intimately connected with the conduct of the cause in court that it could fairly be said to be a preliminary decision affecting the way that cause was to be conducted when it came to a hearing ... .

On his own admission, Mr. P.M. Mahalingam admitted that he was negligent in preparing Form 114 by not following closely to the format found in the RHC. The obligations of Mr. P.M. Mahalingam towards his client, the plaintiff, must be viewed at two angles. Firstly, at equity. Secondly, at common law. In equity, the relationship between a solicitor and his client is entirely fiduciary (*Owen v. Ord* [1828] 3 C & P 349; *Wiggins v. Peppin* [1839] 2 Beav 403; *Bird v. Harris* [1881] WN5, CA) and it carries with it the obligations on the solicitor's part to act not only with strict fairness but also with an attitude of openness. Failure to adhere to this onerous obligation renders the solicitor liable to make compensation for any loss incurred by his client (*Nocton v. Lord Ashburton* [1914] AC 932 HL*; Re Burford, Burford v. Clifford* [1932] 2 Ch. 122, CA). On the other hand, at common law a solicitor by his retainer must be skilful and careful. Mr. P.M. Mahalingam must put at the plaintiff's disposal not only his skill but also his knowledge of the law as far as is relevant and germane (*Spector v. Ageda* [1973] Ch. 30; [1971] 3 All ER 417). In the context of the present case, Mr. P.M. Mahalingam lackadaisical attitude in

filing encls. 46, 49 and 21 without complying with Form 114 open him, in law, to liability in tort for negligence (*Midland Bank Trust Co Ltd v. Hett, Stubbs and Kemp (a firm)* [1979] Ch. 384; [1978] 3 All ER 571). The magnitude of Mr. P.M. Mahalingam's self confessed negligence and his consequent liability may even extend to third persons: *Ross v. Caunters* [1980] Ch. 297; [1979] 3 All ER 580; *White v. Jones* [1995] 2 AC 207; [1995] 1 All ER 691 HL and *Penn v. Bristol & West Building Society* [1995] Times, 19 June. The negligence of Mr. P.M. Mahalingam is so gross that it is beyond description.

Solicitor's Obligations Towards The Court

A solicitor has a professional obligation to observe the standard of conduct required of members of his profession particularly to conform to the Legal Profession Act 1976 (Act 166) and the Legal Profession (Practice And Etiquette) Rules 1978. Under s. 77 of the Legal Profession Act 1976, the Bar Council may, with the approval of the Attorney General, make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. For the purpose of this judgment, rr. 15, 17 and 18 of the Legal Profession (Practice And Etiquette) Rules 1978 should be referred as they give the pith and the depth of Mr. P.M. Mahalingam's duty to this court. Thus, r. 15 states that: "An advocate and solicitor shall maintain a respectful attitude towards the court." Rule 17 states that: "An advocate and solicitor shall not practice any deception on the court." Finally, r. 18 states that: "The conduct of an advocate and solicitor before the court and in relation to other advocates and solicitors shall be characterised by candour, courtesy and fairness."

Great care has to be exercised when a solicitor is dealing with the court. As an officer of the court, the solicitor must not do anything so as to deceive the court. The time has come for the courts to adopt a stringent approach and castigate lawyers who by deception deceived the courts into believing that concessions made by the lawyers to strike out their appeals, like the present case, would end the adjudication, once and for all. Stringency is desirable to prevent breaches of the Legal Profession (Practice And Etiquette) Rules 1978. Section 94(3) of the Legal Profession Act 1976 defines "misconduct" to mean "conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:

> (d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise.

It is instructive to note that an allegation of conduct unbefitting a solicitor has been held to be substantiated against a solicitor where that solicitor wilfully misled the court: *Re Hill* [1868] LR 3 QB 543; *Stephens v. Hill* [1842] 10 M & W 28; and *Re Cooke (A Solicitor)* [1889] 33 Sol. Jo. 397 CA. Authorities are abound as to what would constitute misconduct. Misconduct in proceedings may extend to bringing vexatious and frivolous proceedings (*R v. Fielding* [1758] 2 Burr. 654; *Cockle v. Whiting* [1829] 1 Russ & M. 43), or it may even extend to knowingly filing the action knowing that there is no reasonable cause of action or for that matter defending an action on the basis of flimsy defences having little or no chance of success (*Rolfe v. Rogers* [1811] 4 Taunt 191; *Taylor v. Lawrance* [1892] 27 LJ 422) or filing proceedings which are fraudulent (*Dundas v. Dutens* [1790] 1 Ves. 196) or, finally, filing what may be termed as instituting unnecessary proceedings (*Re Parker* [1819] Buck 313). But misconduct that will stir the court to life and that will receive the vehement disapproval of judges, the world over, would be deception. To practise deception to the court would be akin to "ridiculing" the court. That would be misconduct so grave that words could not describe it.

Whyatt CJ in *Yee Chang & Co Ltd v. NV Koninklijke Paketvaart Maatschappij* [1958] MLJ 131, 133 remarked that:

> A solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice. If, therefore, a solicitor becomes aware in the course of proceedings that his client is obstructing the interest of justice, it is his duty to advise his client as to the conduct which he ought to follow and if the client still persists in his wrong conduct, he should decline to act for him further.

In *Cheah Cheng Hoc v. Public Prosecutor* [1986] 1 MLJ 299, the concealment of an important document from the court was considered contemptuous conduct and that the solicitor's duty to the court was said to be paramount and outweighed the solicitor's duty to the client.

It is a correct statement of the law to say that the solicitor should fearlessly conduct the cause of action having both his duty to the court as well as his duty to his client in mind, but the solicitor must always be mindful of the paramountcy of his duty to the court (*Myers v. Elman* [1940] AC 282; and *Clark v. Girdwood* [1877] 7 Ch. D. 9).

Mr. P.M. Mahalingam must have obtained instructions from his client, the plaintiff, when he withdrew encls. 46, 49 and 21. What made Mr. P.M. Mahalingam filed an appeal against the striking out of these enclosures? Did his client instruct him to file that appeal? Was his client appraised of the facts that transpired before the court on 29 August 1997? Whatever the answers that may be advanced to these questions they are mere conjectures. Of

paramount importance would be the duty of Mr. P.M. Mahalingam to this court and not to his client. It is instructive to note that an appeal to the judge-in-chambers under O. 56 r. 1(1) of the RHC is by way of an actual hearing of the application which led to the order under appeal and the judge will definitely treat the matter as though it came before him for the very first time. In the words of Lord Atkin in *Evans v. Bartlam* [1937] AC 473 especially at p. 478, the judge "will of course give the weight it deserves to the previous decision of the Master; but he is in no way bound by it." Substituting the word "Master" with the word "SAR", the judge will give due weight to the decision of the SAR but the judge is in no way fettered by the previous exercise of the SAR's discretion on the matter in issue. In short, the parties in an appeal to the judge-in-Chambers are free to ventilate once again before the judge. There was ample time between the disposal of the case before the SAR and the appeal to the judge-in-chambers for Mr. P.M. Mahalingam to take instructions pertaining to enclosures 46, 49 and 21. Thus, on 29 August 1997 when Mr. P.M. Mahalingam withdrew these enclosures the irresistible inference was that he had obtained instructions from his client. This was my judgment and I so hold accordingly. If Mr. P.M. Mahalingam did not obtain his client's instructions to withdraw these enclosures but instead took the gamble to withdraw at his own whims and fancies then he must be held accountable for deception under r. 17 of the Legal Profession (Practice And Etiquette) Rules 1978. As an advocate and solicitor, Mr. P.M. Mahalingam should maintain a "respectful attitude towards"this court. With respect, he certainly failed to live up to expectations.

Reported by Ling Hea Hoon